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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 206

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Petitioner,

vs.

NATIONAL MEDIATION BOARD, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY and ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the District of Columbia Circuit.

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In the Supreme Court of the United States

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No. _____.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

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vs.

NATIONAL MEDIATION BOARD, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY and ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the District of Columbia Circuit.

Petitioner, Brotherhood of Locomotive Engineers, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 14, 1969, which reversed the judgment entered by the United States District Court for the District of Columbia.

OPINIONS BELOW.

The opinion of the Court of Appeals is set forth in Appendix A, *infra*, pp. 28-47, and is not yet officially reported. The Findings of Fact, Conclusions of Law and Judgment of the District Court (Appendix B, *infra*, pp. 48-64) are reported in 284 F. Supp. 344.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 14, 1969. On March 28, 1969, petitioner filed a petition for rehearing, which was denied on April 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

The bargaining representative for the craft of locomotive firemen served each of the respondent railroads, as well as most of the other rail carriers in the United States, with a notice under Section 6 of the Railway Labor Act (45 U.S.C. § 156) proposing the establishment of a program for hiring and training apprentice locomotive engineers who would qualify and receive seniority rights as locomotive engineers upon successful completion of the apprentice program. Asserting that such apprentices come within the craft represented by it, the bargaining representative for locomotive engineers claimed that the Firemen's notice unlawfully encroached upon the jurisdiction of the Engineers' Union. The Firemen's Union threatened to strike the carriers if they did not bargain and agree with it. The Engineers' Union threatened to strike the carriers if they did bargain and agree with the Firemen's Union.

Under these circumstances, the nation's rail carriers applied for the services of the National Mediation Board under Section 5, First of the Act (45 U.S.C. § 155, First), "in order that they may be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." In denying this request, the Mediation Board claimed the question was one of representation, to be resolved under Section 2, Ninth of the Act (45 U.S.C.

§ 152, Ninth). Subsequently, when requested by the Engineers' Union to make this determination through a petition for clarification of its outstanding certifications as bargaining representative for the craft of engineers, the Mediation Board refused to investigate and decide the jurisdictional or representational dispute between the two unions under Section 2, Ninth. The Board arranged mediation sessions on the Firemen's apprentice engineer notices. The Engineers' Union then brought this suit for a mandatory injunction to require the Board to decide the jurisdictional dispute between the two unions and for other equitable relief.

The questions presented for review are:

1) Did the Court of Appeals err in determining that the Mediation Board does not have the statutory duty under Section 2, Ninth of the Railway Labor Act to decide the jurisdictional or representational dispute between the two unions as to which craft, that represented by the Engineers' Union or that represented by the Firemen's Union, encompasses apprentice locomotive engineers?

2) Did the Court of Appeals err in deciding that Section 2, Ninth of the Act is designed to cover only those disputes entailing an election by employees of their representatives and that, therefore, the determination requested of the Board by the Engineers' Union is premature until the Firemen's Union is permitted to negotiate an unspecified number of apprentice locomotive engineer agreements?

3) If the Mediation Board has the present duty to investigate and decide the jurisdictional dispute between the two organizations by certifying which union has the right to represent and bargain for ap-

prentice engineers, may the Board be required to perform that duty?

4) In the instant situation, did the court below err in finding the apprentice engineer notices of the Firemen's Union bargainable prior to resolution by the Mediation Board of the jurisdictional dispute between the two unions through a determination that the Firemen's Union has the jurisdictional authority to represent and bargain for apprentice locomotive engineers?

STATUTE INVOLVED.

The statutory provisions involved are Sections 1a; 2, Second, Third, Fourth, Seventh, Ninth; 5, First; and 6 of the Railway Labor Act, as amended (45 U.S.C. §§ 151a; 152, Second, Third, Fourth, Seventh, Ninth; 155, First; and 156), which are set forth in Appendix C, *infra*, pp. 65-69.

STATEMENT OF THE CASE.

Background of the Events Leading to This Controversy.

For many years, the Brotherhood of Locomotive Engineers ("Engineers' Union") has been the duly authorized collective bargaining representative for the craft of locomotive engineers on the respondent rail carriers and on most of the nation's railroads (A. 328).[1] The Brotherhood of Locomotive Firemen and Enginemen[2] ("Fire-

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[1] References are to the Appendix in the Court of Appeals, Cases Nos. 22,050 and 22,185 involving the respective appeals of the Firemen's Union and the Mediation Board from the judgment of the District Court.

[2] On January 1, 1969, the Firemen's Union and three other labor organizations merged into the United Transportation Union, which assumed all the rights and liabilities of the former unions. The Firemen's Union is no longer in existence as a separate entity, but will be designated as such in accordance with the opinion below.

men's Union") has been and is the bargaining representative for the craft of locomotive firemen on the respondent railroads and on the majority of the other railroads in the United States (A. 329). Throughout this period, the Engineers and Firemen, as bargaining representatives for the respective crafts, have been involved in a series of disputes concerning the scope of their jurisdictional authority and the power to govern matters related to the craft of locomotive engineers.[3]

The dispute herein, which the Engineers' Union submits is a jurisdictional one of the representation variety,[4] can be considered an outgrowth of the award issued on November 26, 1963 by Arbitration Board No. 282 (41 Lab. Arb. 673), which authorized the elimination of ninety percent of the existing firemen positions on freight and yard

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[3] See *General Committee v. Missouri-K.-T. R. Co.*, 320 U. S. 323 (1943); *General Committee v. Southern Pac. Co.*, 320 U.S. 338 (1943).

[4] In *Carey v. Westinghouse Corp.*, 375 U.S. 261, 263 (1964), this Court defined the term "jurisdictional dispute" in the following manner:

> "We have here a so-called 'jurisdictional' dispute involving two unions and the employer. But the term 'jurisdictional' is not a word of a single meaning. In the setting of the present case this 'jurisdictional' dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work."

See also *Transportation-Communication Employees Union v. Union Pacific Co.*, 385 U. S. 157, 161 (1966).

Applying this distinction and the similar differentiation made by the amicus brief of the Solicitor General in the *Carey* case, *supra*, the Engineers' Union submits that this jurisdictional dispute involves craft composition; because the question here is not which of the two crafts will do certain work, such as electrical inspection, but rather which of the two unions will represent certain employees—apprentice locomotive engineers.

engine crews.[5] From 1963 to 1966, eighteen thousand firemen were severed from employment, which was "a staggering blow to the BLF&E" as to its membership totals. *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co.*, 385 F. 2d 581 at 591, 601, n. 1 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968).

On March 25, 1965, as to the Louisville & Nashville Railroad, and on April 28, 1965, as to the Southern Pacific, the Firemen's Union served notices relating to apprentice locomotive engineers (A. 79-97). On most of the remaining railroads, notices bearing on apprentice engineers were served on November 15, 1965, along with two notices dealing with firemen (A. 50-69, 332). The notice concerning apprentice engineers is the subject of this proceeding.[6]

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[5] On November 2, 1959, the nation's railroads served Section 6 notices, which included the issue of retaining firemen on all diesel locomotives in freight and yard service. See *Brotherhood of Locomotive Engineers v. Baltimore & O. R. Co.*, 372 U. S. 284 (1963). The Presidential Railroad Commission was created on November 1, 1960, by Executive Order 10891 to study the questions raised. The question of retaining firemen was the subject of further study by Emergency Board No. 154, appointed on April 3, 1963, under 45 U.S.C. 160, and of compulsory arbitration by Arbitration Board No. 282, established on August 23, 1963, by Public Law 88-108, 77 Stat. 132. Each of these Boards found that dieselization had led to the almost complete elimination of "the principal work which firemen had customarily done when they worked on steam locomotives." Pres. R. R. Comm'n Rep., Wash., D.C., February 1962, p. 36.

[6] The November 15, 1965 notices of the Firemen's Union were involved in *Brotherhood of Railroad Trainmen v. Akron & B. B. R. Co., supra*, but the issues herein were excluded from that litigation by stipulation of the parties thereto. 385 F. 2d, at 600.

The involved notice of November 15, 1965, is subtitled as "training for railroad locomotive enginemen apprentices," which are defined as persons "engaged in learning the craft of locomotive enginemen." (A. 56). There is no craft of enginemen, only engineers and firemen, 45 U.S.C. 153, First (h), and the substance of the proposal leaves no doubt as to its purpose—to

(Continued on following page)

Informally negotiating with the carriers regarding apprentice engineer training programs prior to the November 15th notices, the Engineers immediately informed the carriers that the Firemen's proposal "infringes upon the statutory rights of the duly designated representative of the craft of locomotive engineers and the employees within that craft." (A. 18-19). The carriers and the Mediation Board were also informed that the Engineers' Union would enforce its statutory rights as bargaining representative for the craft of locomotive engineers to represent and bargain for apprentice engineers through appropriate legal measures, subsequently elaborated upon to include the right to strike (A. 19, 196).

The Situation Before the National Mediation Board.

Under the above circumstances, the nation's rail carriers applied on June 6, 1966, for the Mediation Board's services under Section 5, First of the Act, asking for the Board's "mediatory services in order that they may be properly and legally informed as to which of the two disputing organizations may legally bargain for and on

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(Continued from preceding page)

create apprentices in the engineers' craft. For example, in regard to seniority, the Firemen's notice states, "Apprentices who have completed this training shall receive a seniority date as locomotive engineer." (A. 65). Any remaining doubt as to the purpose of this training program is dispelled by the appendix thereto which states, "When the apprentice has successfully completed the term of apprenticeship and has passed the final examination, he then will be qualified as a railroad locomotive engineer and will receive a seniority date as locomotive engineer in keeping with the appropriate provisions of the current agreement." (A. 67). The apprentice notices served prior in time on the Louisville & Nashville and the Southern Pacific use somewhat different terminology but bear similar import, i.e., to create an apprentice locomotive engineer training program and to legislate on the terms and conditions of employment and seniority of such apprentices in the craft of locomotive engineers.

behalf of apprentice locomotive engineers." (A. 202-203). There followed an exchange of views between the Board and the parties hereto (A. 207, 209, 284).

On June 21, 1966, the Board denied the carriers' request for the following reason: "The question as posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act." (A. 101). The carriers then sent a letter to the Board requesting a hearing (A. 101-106).

On June 30, 1966, the Engineers' Union, noting the above response of the Board, sought to invoke its services pursuant to Section 2, Ninth, to determine which organization, the Engineers or the Firemen, represents apprentice locomotive engineers on the respondent Louisville & Nashville Railroad (A. 19, 20). The parties filed lengthy position letters with the Mediation Board (A. 101-117; 212; 221). By letter of July 13, 1966, the Firemen's Union clearly indicated that a representational dispute does exist between the two unions in regard to representation of apprentice engineers on the various carriers throughout the country (A. 115-117).

On July 22, 1966, the Board issued its directions in the two matters before it. In regard to the carriers' application and request for a hearing, the Board reiterated its contention that the issue "involved a question of representation under Section 2, Ninth of the Railway Labor Act." (A. 70). The carriers' request for a hearing was, therefore, denied. With respect to the request of the Engineers' Union for an adjudication of the opposing claims of the two organizations concerning apprentice engineers of the Louisville and Nashville Railroad, the Board, contradicting its comment in regard to the carriers' application, said that a representation dispute under Section 2, Ninth did not exist over which it had jurisdiction

and further that under Section 2, Ninth "the Board has no authority to decide a jurisdictional dispute as such." (A. 28). Therefore, the application of the Engineers' Union was dismissed (A. 29). In conclusion the Board stated without description that "procedures other than those outlined in Section 2, Ninth of the Railway Labor Act are available to settle such disputes." (A. 28).

On July 27, 1966, the Engineers' Union applied for the Board's services under Section 2, Ninth to determine which organization does represent apprentice engineers on the respondent Southern Pacific for purposes of the Railway Labor Act (A. 29-31). On July 28, 1966, the Engineers' Union asked the Board to reconsider its dismissal of the Engineers' Section 2, Ninth application in regard to the apprentice engineers on the Louisville & Nashville, and to advise the Engineers' as to the "procedures other than those outlined in Section 2, Ninth" available to settle the dispute (A. 32-35). The Board did not reply to either of these letters, except to notify the Engineers' Union on August 1, 1966 that mediation conferences with respect to the Firemen's apprentice engineer notices upon the Louisville & Nashville and the Southern Pacific would be held on August 4, 1966[7] (A. 228). On

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[7] Recognizing that the Board construes Section 2, Ninth as referring to certification of single carrier units, the Engineers' Union applied for determination of the apprentice engineer representation problem on the Louisville & Nashville and then the Southern Pacific. *Switchmen's Union v. National Mediation Board,* 320 U. S. 297 (1943). See also *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.,* 383 F. 2d 225, 228 (1967). The Board refused to entertain the first application and did not respond to the second. Under the circumstances, no purpose would have been served by filing additional applications. In requesting that apprentice engineers be considered an integral part of the craft of locomotive engineers, the applications further recognized that the Board has consistently refused to splinter or subdivide crafts or classes for representation purposes. *Matter of Representation of Employees of New York Central R. Co.,* 1 N.M.B. 197, 209-210 (1941).

that date, representatives of the Board met separately with the representatives of the Firemen's Union and those carriers, but the merits of the apprentice engineers notices of the Firemen's Union were not discussed (A. 337).

Related Events Transpiring Prior to and During the Pendency of This Litigation.

On April 28, 1966, the respondent Louisville & Nashville and the Engineers' Union entered into an agreement respecting apprentice locomotive engineers on the Louisville & Nashville (A. 193, 331). Subsequently, the Firemen's Union sought on two occasions to enjoin the effectuation and implementation of that agreement, but those attempts were unsuccessful. *Brotherhood of Locomotive Firemen and Enginemen v. Louisville and Nashville R. Co.*, 400 F. 2d 572 (6th Cir. 1968), *cert. denied*, 37 U.S.L. Week 3262 (U.S. Jan. 21, 1969). In affirming the dismissal of those complaints on the ground that the federal courts lack the power to adjudicate the jurisdictional dispute involved between the two unions, that court of appeals said, citing Section 2, Ninth: "Congress has conferred exclusive jurisdiction upon the National Mediation Board to resolve such disputes," (*id.* at 574-5) and concluded, "Jurisdictional disputes between labor organizations governed by the Railway Labor Act are within the exclusive jurisdiction of the National Mediation Board." *Id.* at 575.

On September 13, 1967, the respondent Great Northern Railway and the Engineers' Union entered into an agreement covering the future training of apprentices to become locomotive engineers (A. 322-327). In the fall of 1968, Great Northern began preparation for the training of apprentice engineers, the first class commencing on

January 6, 1969. On January 3, 1969, the Firemen's Union, as part of the United Transportation Union, threatened to strike to prevent the implementation of the Engineers' agreement with the Great Northern. The Great Northern obtained a temporary restraining order from the United States District Court for the District of Columbia on the same evening. Pursuant to the directions of that court, the Great Northern moved for supplemental injunctive relief in this case on January 6, 1969. Insofar as the carrier's motion sought a preliminary injunction against the threatened strike, the District Court granted said injunction pending final hearing on the motion for supplemental relief. In granting this relief the District Court relied upon the basic decree, which it had entered in the case at bar. The Firemen's Union has appealed that order. *Brotherhood of Locomotive Firemen and Enginemen v. Brotherhood of Locomotive Engineers,* Case No. 22,648 (D.C. Cir. 1969), *motion for summary reversal pending.*

THE CASE NOW BEFORE THIS COURT.

On August 4, 1966, the date scheduled for mediation on the Firemen's notices, the Engineers' Union filed its complaint in this case seeking declaratory and injunctive relief against the Board, the Firemen's Union, and the six respondent railroads. The petitioner requested the lower court (1) to declare the Firemen's notices invalid, (2) to enjoin the Firemen's Union from negotiating with the carriers on the aforesaid notices and from interfering with the jurisdictional collective bargaining rights of the Engineers' Union as bargaining agent for the craft of locomotive engineers, (3) to restrain the Mediation Board from requiring the carriers to negotiate or mediate with

the Firemen's Union in regard to apprentice locomotive engineers until the Board resolved the jurisdictional or representational dispute between the two organizations as to which has the right to represent and bargain for apprentice engineers, and (4) to issue a mandate requiring the Mediation Board to perform its statutory duties under Section 2, Ninth by determining that question (A. 15-16). The carriers cross-claimed against the Firemen's Union for, *inter alia*, an injunction from having to bargain with that union unless and until the Board had determined that the Firemen's Union had the right to represent and bargain for apprentice locomotive engineers (A. 48-49).

Upon cross-motions for summary judgment, the District Court found that the federal courts have the power to determine whether the Mediation Board has performed its statutory duty under Section 2, Ninth of the Act and that the Board had failed to perform that duty. Accordingly, the District Court ordered the Board to perform its mandatory duty under Section 2, Ninth, to investigate and "to certify to the parties whether such apprentices come within the craft or class of locomotive engineers represented by the BLE or within the craft or class of locomotive firemen represented by BLF&E, if either." (A. 342; App. B, p. 63). In addition, the Firemen's Union was enjoined from engaging in self-help measures as to its notices unless the Board should rule in favor of it and the procedures of the Act were otherwise exhausted (A. 342-343; App. B, p. 64).

On March 14, 1969, the Court of Appeals reversed and vacated the lower court's injunction and also the orders enforcing the basic decree as to the Great Northern situation from which the Firemen's Union sought interim relief (App. A, p. 44).

In its principal opinion, the Court of Appeals found that the orders of the District Court were based on what it considered to be two erroneous conclusions of law: (1) the Firemen's apprentice engineer notices are valid and bargainable "only if the BLF&E is the duly designated and authorized representative on such carriers of apprentices training to be locomotive engineers"; and (2) the dispute between the Engineers' and Firemen's Union "is a dispute among employees as to who are the representatives of such employees" within the meaning of Section 2, Ninth of the Act (App. A, p. 34).

Finding that the fireman's expectation of promotion to the job of engineer is a "term or condition" of employment as to which the Firemen's Union may legitimately bargain, the principal opinion concluded that the Firemen's Section 6 notice concerning engineer apprenticeship programs were, in essence, bargainable in their entirety. Therefore, the District Court's order relieving the carriers of their duty to bargain on that notice until the Board had resolved the representational dispute between the two organizations was set aside.

In holding that the Mediation Board lacked jurisdiction under Section 2, Ninth over the involved dispute between the organizations, the principal opinion said:

> "These policy considerations demonstrate why it would be premature for the Board to decide now who represents apprentice engineers. These policies, the literal language of the statute, and the Board's own reading of it, all lead toward the conclusion that the Board presently lacks jurisdiction under Section 2, Ninth, to determine the representative of apprentice locomotive engineers." (App. A, p. 44).

In effect, the court adopted the view of the Board that Section 2, Ninth is designed to cover only those dis-

putes entailing an election by employees of their representatives. Although finding "a dispute between the two unions which revolved generally around the apprenticeship program," the court approved a "wait-and-see" approach, i.e., the Firemen's Union should be allowed to negotiate and obtain a number of apprentice engineer agreements before the Board need make any determination (App. A, pp. 42, 43). In an apparent dichotomy of reasoning, the principal opinion directed the Engineers' Union during this hiatus to the procedures before the National Railroad Adjustment Board if the apprentice engineer agreements negotiated by the Firemen's Union derogated from the former's status as certified representative of locomotive engineers.

To further confuse the situation, a majority of the court below filed a concurring opinion, which claimed that the Adjustment Board did not have jurisdiction since none of the parties claim that the instant dispute arises under their respective collective agreements; that the absence of apprentices precludes there being a representational dispute under an inadequate statutory scheme; and that, therefore, either union may strike once the statutory procedures are exhausted (App. A, pp. 44, 47). However, without defining the exact scope of the Firemen's bargainable interest in the apprenticeship training program, the concurring opinion indicated the bargainable interest of the Firemen related solely to the effect of that program, that is the promotional rights of existing firemen, while that of the Engineers extended to the internal structure of the apprentice programs (App. A, pp. 45-46).

REASONS FOR GRANTING THE WRIT.

Admittedly, the issues involved are novel in light of the circumstances from which they arise. While raised in a unique factual situation, they nevertheless have recurringly troubled those industries covered by the Railway Labor Act. And this case—or at least the problems with which it is concerned—will not merely disappear. Therefore, the questions raised herein, whether or not decided correctly below, merit this Court's attention, for the rulings requested are significant to the adequate administration of the Railway Labor Act. But we submit the decision below is incorrect, in that it contravenes the teachings of this Court in its prior rulings under the Act and also directly conflicts with the decisions of other circuits.

Fundamentally, the holding of the Court of Appeals violates the basic purposes of the Act by negating the principle that a carrier may bargain only with the true representative of its employees. Further, the lower court's ruling that the Mediation Board lacks jurisdiction to resolve this dispute between the two unions can only be disruptive of peaceful and meaningful labor relations, the cornerstone of the Act (45 U.S.C. §§ 151a, 152 First). Unless an administrative tribunal, which petitioner submits in this instance is the Mediation Board, has the power to resolve this dispute, the carriers are placed in the dilemma of choosing which organization to bargain with as the representative of apprentice engineers in anticipation of being struck by the dismayed suitor. On the other hand, the unions are forced to enter into a race to obtain the first apprentice engineer agreement with a given carrier in order to record title or claim to those employees or prospective employees. And most critically, if both unions are entitled to progress apprentice engineer notices and to

strike to enforce their demands, the public interest in the unhampered flow of commerce is placed in jeopardy.

1. The decision below fails to follow the prior teachings of this Court. Those rulings fall into three categories; the duty of the carriers to bargain only with the true craft representative of its employees, the resolution of jurisdictional disputes by administrative agencies, and the power of the courts to review decisions of the Board and to order it to fulfill its statutory duties under Section 2, Ninth.

In *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 548 (1937), this Court found that the Act imposes upon the carrier "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." Finding that decision did not imply that every representation problem under the Act should be litigated in the federal courts, the Court subsequently stated in *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323, 336 (1943):

> "However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive." [8]

On the same day, this Court held that another jurisdictional dispute between the same unions was not for the courts to resolve. *General Committee v. Southern Pacific Co.*, 320 U.S. 338 (1943). But, in so holding, the Court found that the so-called jurisdictional controversies between unions had been left to agencies or tribunals other than the courts based on the rationale of the *M-K-T* case,

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[8] Footnotes omitted.

supra. Reading the 1943 trilogy together, which includes *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), it is submitted that this Court has found the National Mediation Board to be the tribunal created for the solution of jurisdictional disputes of the representational variety.

In accord with these principles, the District Court herein issued a mandatory injunction requiring the Board to litigate the instant dispute and found that the Firemen's apprentice engineer notices were nonbargainable unless and until the Board decided that the Firemen's Union had the right to represent and bargain for apprentices, *i.e.*, that the Firemen's Union was the true representative with which the carriers had to bargain on the subject. Contrary to the above teachings of this Court, however, the Court of Appeals held that the Board did not have the power under Section 2, Ninth to resolve the jurisdictional dispute at issue and that, therefore, the Firemen's notices were fully bargainable at the present time.[9]

Further, in jurisdictional disputes of the work-assignment variety, this Court has held that the entire dispute can and should be handled in a single proceeding by the National Railroad Adjustment Board. *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966). Although that type of dispute requires the interpretation and application of the collective agreements under Section 3 of the Act with respect to the conflicting claims of the two unions to have

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[9] The concurring opinion of two judges indicate nevertheless that the Firemen's notices are only bargainable as to the extent of the promotional rights of existing firemen. (App. A, p. 46). The court below, however, did not remand the case to the District Court for further consideration on that point, and subsequently dismissed the Engineers' and railroads' separate petitions for rehearing in which the matter was specifically raised.

the jobs assigned to their members, which is not the situation here, the reasoning underlying that decision is fully applicable to this controversy and supports the premise that the Mediation Board has been provided with the exclusive machinery to resolve this jurisdictional dispute over craft composition. Since, however, the election procedures prescribed by the Board's Regulations, 29 C.F.R. §§ 1203.2, 1206.2 (1967), could not be utilized, the court below decided that Section 2, Ninth was not applicable; therefore, the Board lacked jurisdiction to determine the representative of apprentice locomotive engineers. It was that court's view that there had to be a dispute among employees signified by authorization cards[10] (App. A, pp. 40-41). The *TCEU* case, *supra*, is significant hereto in that the decision recognized that the provisions of Section 3, though directed to the carriers, do not detract from the power of the Adjustment Board to fulfill its tasks. *Id.* at 164. See also *id.* at 168 (Stewart, *J.*, concurring). So here, although Section 2, Ninth, refers to a dispute "among a carrier's employees as to who are the representatives of such employees" and to the taking of "a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives," this too does not negate the power of this Board to perform the functions delegated to it by Congress. Rather the Board could have acted

[10] The Board did not dismiss petitioner's application on the basis of lack of authorization cards or the inability of the Board to hold an election. Those arguments were first advanced by counsel for the Board. Unless the statutory language of Section 2, Ninth requires as a matter of law the submission of authorization cards and the holding of an election before the Board may decide a representation dispute, it is submitted that neither counsel for the Board nor the court below could shore up the Board's action, actually its failure to act, in the instant situation. *SEC v. Chenery Corp.*, 318 U.S. 70, 87-88 (1943); *Burlington Truck Lines v. U. S.*, 371 U.S. 156, 168-169 (1962).

upon the application of the Engineers' Union by clarifying the existing certifications that the two unions already have from the Board, an appropriate alternate method to the election procedures. *Cf. Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 267 (1964).

In concluding that an election is required to create a representation dispute, the Court of Appeals relied in part upon a literal interpretation of the statute, which is a precarious position at best. In *Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 488 (1957), this Court stated that the provisions of the Railway Labor Act must be read in the light of the policies that each section was intended to serve. The legislative history of Section 2, Ninth unambiguously shows that the draftsmen intended that the section would empower the Mediation Board to decide jurisdictional disputes such as here presented.[11]

This case, therefore, reaches the questions specifically reserved by this Court in *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323, at 336, n. 12 (1943), as to whether judicial power may be exerted to require the Board to exercise the statutory duty imposed upon it by Section 2, Ninth and if so, the types of situations in which

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[11] In response to several questions during the Congressional hearings on the 1934 Railway Labor Act amendments Joseph B. Eastman, Federal Coordinator of Transportation, stated:

"[I]f there are any disputes [between the different classes of employees as to the jurisdiction of each] I think that matter is sufficiently covered by the provisions of the ninth paragraph, which provides for the settlement of such disputes, or rather, provides the tribunal which shall have power to consider and determine such disputes." *Hearings Before House Committee on Interstate and Foreign Commerce on H.R. 7650*, 73d Cong., 2d Sess., p. 45.

Later, Commissioner Eastman said (*id.* at 57):

"It is the intent that [a conflict of jurisdiction as to classes and crafts as comes up in the classification of employees] would be handled under the paragraph ninth that I have discussed." (Material in brackets supplied).

it may be invoked. Subsequently, this Court partially answered those questions in *Brotherhood of Ry. & S. S. Clerks v. Non-Contract Employees Association,* 380 U.S. 650, 661 (1965). The Court concluded that the Board's action therein (failure to provide a ballot permitting a vote against representation) was reviewable "to the extent that it bears on the question of whether it performed its statutory duty 'to investigate' the dispute." *Id.* at 661. Implicit in the Court's holding that the Board's actions are reviewable to the extent necessary to determine whether the Board performed its statutory duty under Section 2, Ninth, is acceptance of the principle of the judicial power to order the Board to perform its duty should it fail to do so.

However, finding in contravention to the above authorities that Section 2, Ninth does not impose any duty on the Board to determine the jurisdictional dispute as to which craft apprentice engineers come within for purposes of representation and bargaining, the court below did not need to decide, as did the District Court, that the Board could be required to exercise the duties imposed upon it by that section of the Act. If the Court of Appeals erred in that decision, which petitioner submits it did, this Court would in resolving the issues be called upon to determine the still open question as to whether Section 2, Ninth was designed only to cover those disputes entailing an election by employees of their representatives, the view of the Board accepted by the lower court.[12]

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[12] In *Brotherhood of Railroad Trainmen v. National Mediation Board,* 135 F. 2d 780 (1943), the District of Columbia Circuit in affirming the Board's refusal to decide a jurisdictional dispute as to the assignment of work to a particular craft intimated that a representation dispute for purposes of Section 2, Ninth is a dispute entailing an election of representatives. *Id.*

(Continued on following page)

On the above basis, it is submitted that this Court should grant this petition in order to resolve the conflict between the opinion below and the teachings enunciated by the Court in its previous decisions with regard to the Railway Labor Act. Further, this case would be a most

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(Continued from preceding page)

at 782, 784 (Rutledge, J., concurring). This Court took note of the Board's position contained in its opinion, 1 N.M.B. 130 (1938), and the above decision, in the *M.-K.-T.* case, *supra*, 320 U.S. at 336, n. 11, but did not pass on the correctness of that view.

But the Board has not always closely followed this approach. In the *Matter of Representation of Employees of the Chicago, North Shore & Milw. R. Co.*, 3 N.M.B. 101 (1953), the Board distinguished its decision involved in the *Trainmen's* case, *supra*, and refused to dismiss an application to include a group of employees under an outstanding certification. Another union claimed the same employees were properly part of the craft it represented and that on the basis of the *Trainmen's* case, therefore, the Board did not have statutory authority under Section 2, Ninth to decide the issue. The Board, however, found that the *Trainmen's* case involved a work assignment dispute whereas the involved dispute concerned craft composition. In the *Matter of Representation of Employees of American Airlines, Inc.*, 2 N.M.B. 3 (1953), the Board held lengthy hearings to determine a dispute between two unions as to which represented reservisors employed by the airline, though the application was not supported by authorization cards. The Board found that the "men performing maintenance work on the reservisor machines at New York are radio mechanics and are a part of the craft or class of airline mechanics now represented by the TWU-CIO under contract with American Airlines * * *." *Id.* at 2 N.M.B. 6. After drawing the craft boundaries resolving the dispute, the Board dismissed on two grounds; the application was not properly supported by authorization cards and improperly covered employees of another craft. *Ibid.* It cannot be seriously contended that the Board's holding in regard to craft determination was a gratuitous expression. The Board fulfilled its Section 2, Ninth duty and thereby concluded the dispute. The Board has often handled applications in representation disputes by merely classifying the employees involved to established crafts already represented by unions. See *Matter of Representation of Employees of the Northern Pac. Term. Co. of Ore.*, 3 N.M.B. 112 (1953), in which the Board said that in deciding the proper classification of employees for representation purposes it did not interpret the existing collective agreements and that it was not encroaching on the jurisdiction of the Adjustment Board.

appropriate means through which this Court could shed judicial light on the validity of the existing practices and procedures of the Board insofar as the latter has refused to resolve interunion jurisdictional disputes, that species as to which of two unions has the authority to represent the employees doing a certain work.

2. The decision of the Court of Appeals conflicts with the decisions of other courts of appeals. Specifically, the opinion below is contrary to the decision in *Brotherhood of Locomotive Firemen & Enginemen v. Louisville & Nashville R. Co.*, 400 F. 2d 572 (1968), *cert. denied*, 37 U.S.L. WEEK 3262 (Jan. 21, 1969), wherein the Sixth Circuit held that the involved jurisdictional dispute is "within the exclusive jurisdiction of the National Mediation Board." *Id.* at 575. In so holding,[13] that circuit fol-

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[13] In recognizing this conflict in views, the Fifth Circuit recently said:

"This sequel concerns the internecine, intramural, probably non-fraternal dispute between the two Brotherhoods as to which gets the Apprentice Engineer craft and the dilemma facing the Carriers in recognition and bargaining. With the collective apologia of the Court's principal spokesman Judge J. Skelly Wright, and special sentiments of Judges Burger and Tamm, the Court may itself be giving its decision the characterization that it is bound to be right because it is so wrong in result. See *Gulf Oil Corp. v. Panama Canal Co.*, 5 Cir. 1969, ___ F. 2d ___, ___ [No. 25141, Feb. 5, 1969, slip opinion at 4]; *Lawrence v. United States*, 5 Cir., 1967, 269 F. 2d 452, 467.

"To add to the confusion, this may put the D. C. Circuit in conflict with the Sixth's opinion. See *Brotherhood of Locomotive Firemen and Enginemen v. Louisville & Nashville R. R.*, 6 Cir., 1968, 400 F. 2d 572, *cert. denied*, ____ U.S. ____, ____ S. Ct. _____, _____ L. Ed. 2d _____ [37 U.S.L.W. 3262]; cited note 5, D. C. op. [3]." See *Brotherhood of Locomotive Firemen & Eng. v. Central of Georgia Ry. Co.*, ____ F. 2d ____, 36 CCH Lab. Cas. ¶ 10,075, at p. 16260, n. 1 (May 2, 1969); *Brotherhood of Locomotive Firemen & Eng. v. U. S.*, ____ F.2d __, 36 CCH Lab. Cas. ¶ 10,076, at p. 16265, n. 5 (May 2, 1969).

lowed its decision in *Brotherhood of Ry. & S. S. Clerks v. United Air Lines,* 325 F. 2d 576 (6th Cir. 1963), *cert. granted,* 377 U.S. 903 (1963), *cert. dismissed as improvidently granted,* 379 U.S. 26 (1964). There, in holding that the courts lack jurisdiction over a controversy relative to a merged airline's refusal to apply an existing collective agreement to those employees covered by its terms prior to the merger, the remainder being non-union, it was found that the dispute was, in fact, representational and as such within the exclusive jurisdiction of the Mediation Board.

In *Southern Pacific Co. v. Switchmen's Union,* 356 F. 2d 332 (9th Cir. 1966), the Ninth Circuit, in a surprisingly similar case to the one at bar, found the basic or threshold question of representation and jurisdictional authority of the competing unions to fall within the exclusive province of the Mediation Board. Using language fully applicable to this case, the court stated in regard to the Switchmen's notices:

> "SUNA apparently feels the need to extricate itself from what it now regards as an outmoded, unreasonable and discriminatory craft classification. It pictures itself as involved in a fight against ultimate craft extinction, based not upon the fact that technical advances have eliminated the need for work it performs but rather upon the fact that existing craft lines are no longer appropriate. If so, it would seem that the resolution of its problems falls within the adjudicatory jurisdiction of the Mediation Board under Section 2, Ninth. That section, in providing for the certification of bargaining representatives, would seem necessarily to encompass the essential preliminary steps of fixing craft lines and of resolving any interunion disputes in that respect." *Id.* at 335.

Accordingly, the change proposed by the Switchmen's Union in its agreement relative to the transfer of switch-

ing work to a yard over which another union had representational jurisdiction was held not to be a proper subject of a Section 6 notice and did not, therefore, require the carrier to bargain thereon until the Mediation Board had adjudicated the inter-union dispute in respect to craft composition in favor of the Switchmen.

As to the Board's duty to resolve this controversy, prior decisions of other circuits also point to a view opposite of the court below. In *Division 14, Order of R. R. Telegraphers v. Leighty,* 298 F. 2d 17 (4th Cir. 1962), *cert. denied,* 369 U.S. 885 (1962), the Fourth Circuit held an intraunion jurisdictional dispute as to the integration of seniority of employees represented by the plaintiff local union was a representation dispute within the exclusive jurisdiction of the Mediation Board. And in *Howard v. St. Louis S. F. Ry. Co.,* 361 F. 2d 905 (8th Cir. 1966), *cert. denied,* 385 U.S. 969 (1966), the Eighth Circuit held, despite the Board's refusal to decide the dispute, that only the Board had the power under the Act to resolve the preliminary questions of craft or class determination and that, therefore, the claimants were precluded from resorting to the federal courts for a resolution of their disputes.

Concerning the issue of bargainability, the Second Circuit has declined to exercise judicial power to require an airline to bargain with the pilots' union in what it found to be a representation dispute between the union and a committee of pilots, which became the nucleus of a new union, on the basis that the controversy concerned a subject within the exclusive jurisdiction of the Board. *Ruby v. American Airlines,* 323 F. 2d 248 (2d Cir. 1963), *cert. denied,* 376 U.S. 913 (1964). Under the circumstances involved, that court indicated that a carrier need not await certification prior to recognition and bargaining, although it would act at the peril of being right as a result

of the Board's future determination.[14] *Id.* at 254. In the instant case, while apparently recognizing that the apprentice engineer agreements negotiated by the Engineers' Union with the Louisville & Nashville and with the Great Northern are valid, the court below nevertheless did declare the Firemen's notices valid subjects of collective bargaining and thereby require the carriers to bargain thereon under the procedures of section 6 of the Act.[15]

Not only does this ruling of the court below on this

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[14] Compare, however, the comment in *Teamsters v. Railway Clerks,* 402 F. 2d 196, at 202-203, n. 13 (D.C.Cir. 1968), *cert. denied,* 37 U.S.L. Week 3134 (U.S. Oct. 14, 1968). There the court refused to consider the circumstances under which the involved air carriers could lawfully deal with a non-certified labor organization concerning normally required subjects of collective bargaining when none had been authorized. In the note appended to its decision, the court cited *Pan American World Airlines v. Teamsters,* 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd,* 404 F. 2d 938 (2d Cir. 1969), in which the carrier obtained a declaration that it was not required to bargain with the incumbent union during the pendency of an unresolved dispute as to the employe representative and an injunction restraining that union from striking to compel the airline to bargain until the Mediation Board had concluded the representational proceedings. The court below has now apparently answered the question raised in *Teamsters v. Railway Clerks, supra,* in conflict with the cited case and *Ruby v. American Airlines, supra.* In effect, the railroads can bargain with both unions and can be compelled to bargain by either of the competing unions as to apprentice engineers. The sole distinction between those decisions and the case at bar is that election petitions were pending before the Mediation Board. If the lower court is correct in correlating representation disputes to election disputes, then that distinction may be relevant. However, although representation disputes may be the genesis of election disputes, it does not follow that only election disputes compose the former group. See also discussion *supra,* at pp. 20-21, fn. 12.

[15] By vacating the District Court's orders enforcing its basic decree, the court went further by implying, at least, that the Firemen's Union could at this time strike to prevent the implementation and effectuation of the Engineers' apprentice agreement on the Great Northern. Thus, by indirection, the Firemen's Union would be allowed to do what it could not directly do in *Brotherhood of Locomotive Firemen & Enginemen v. Louisville & N. R. Co.,* 400 F. 2d 576 (6th Cir. 1968). But see App. A, p. 36, n. 17.

phase of the case conflict with the decisions in *Southern Pacific Co. v. Switchmen's Union,* 356 F. 2d 332 (9th Cir. 1966) and *Ruby v. American Airlines, supra,* but it fails to adhere to the view expressed by the Fifth Circuit in *Order of Ry. Conductors v. Switchmen's Union,* 269 F. 2d 726 (1959), *cert. denied,* 361 U.S. 899 (1959). In that case, it was held that two unions representing related crafts were not entitled to notice or to bargain on matters affecting the work performed and the seniority of its members while in a craft for which another union was the certified representative, for the latter union had the exclusive prerogative to bargain on the subjects of hiring, seniority and work in its craft. In the instant case, however, the dedecision of the court below would have the effect of having both unions bargain on the same subject, a situation not contemplated by the *Virginian Railway* decision of this Court.[16]

In sum, the decisions of the various courts of appeals consistently apply the rationale expressed by the District Court rather than that employed by the Court of Appeals herein. Since the questions involved have been continuously raised in the federal courts, it is suggested that those issues should be definitively discussed and the conflict resolved by this Court in this case.

3. This case is not only an appropriate vehicle for determining the statutory duties of the National Mediation Board, but would permit the Court to establish the guidelines on the previously discussed open and outstand-

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[16] Misreading the import of the decision in the *Virginian Railway* case, *supra,* to the present controversy, the lower court found that case inapplicable because the "Board has not certified which union is the true representative of 'apprentice locomotive engineers.'" (App. A, pp. 34-35.) However, this is what the dispute is about. Had the Board performed its statutory duty under Section 2, Ninth, it would be clear with which organization the carriers must bargain and with which they could not bargain.

ing issues relative to the proper administration of the Railway Labor Act. It has been recognized that the Board has failed or refused to assume jurisdiction over disputes involving the issue of which of two unions has the right under its certifications to represent the employees in a given assignment and that its policies and practices have been seriously deficient in enabling it to effectively resolve the incipient representational problems occurring in the railroad and airline industries. American Bar Association, Labor Relations Law Section, *Report of the Committee on Practices and Procedures Before the National Mediation Board* (1968), pp. 24, 33-34. In light of these demanding questions, the court below failed to adequately canvass the prevailing philosophy of the Board in connection with the factual situation involved in this case.

It is apparent that only this Court can resolve this confusion. It is also apparent that only this Court can authoritatively determine whether the Mediation Board will be a viable and useful agency in the settlement of jurisdictional disputes of the representational variety as contemplated by the draftsmen of the Act.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

WRIGHT, *Circuit Judge:* The judgment of the District Court under review here relieves certain railroad companies of any duty to bargain over a proposal submitted to them by the Brotherhood of Locomotive Firemen and Enginemen (the Firemen), and enjoins the Firemen from striking to force such bargaining. The District Court has viewed the Firemen's proposal as creating a representational dispute with the Brotherhood of Locomotive Engineers (the Engineers), rather than as a matter for collective bargaining with the railroads, and has ordered the National Mediation Board to decide the dispute under Section 2, Ninth, of the Railway Labor Act.[1] We reverse.

I.

For many years, the railroad industry has recruited virtually all locomotive engineers from the ranks of locomotive firemen. As firemen have moved up the seniority ladder within their craft, they have learned the skills of an engineer while working in the locomotive cab. They have taken examinations administered by the carriers, and those who passed the examinations have, in the order of their seniority as firemen, gained status as engineers. Persons newly qualified as engineers have not normally been immediately employed as such; rather they have continued to work as firemen until the demand for active engineers has reached far enough down the seniority list

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[1] 45 U.S.C. § 152, Ninth (1964). The District Court's findings of fact, conclusions of law and decree are reported in *Brotherhood of Locomotive Engineers v. National Mediation Board,* D. D.C., 284 F.Supp. 344 (1968).

of that craft to encompass them. With seasonal fluctuations in the demand for engineers, the employees at the bottom of the engineer seniority list "ebb and flow" back and forth between serving as engineers and as firemen.

Both the Engineers' and the Firemen's unions have included in their collective agreements with the carriers provisions regulating the progress of employees from fireman to engineer, including the process of "ebb and flow" for those employees near the bottom of the engineer list and near the top of the fireman list. Most engineers have a fireman's seniority number as well as an engineer's number, and many locomotive enginemen are members of both the Firemen's and the Engineers' unions.

Recent events have made it no longer possible for all new engineers to be supplied from the ranks of active firemen. In 1959 the carriers proposed to eliminate the position of fireman for freight and yard service, a proposal which the Firemen resisted. After winding its way through the mediatory procedures of the Railway Labor Act for some years without resolution, the dispute threatened to erupt into a strike in 1963. At that point Congress determined to settle the dispute by compulsory arbitration; Board 282 was established, with power to bind the parties to its resolution of the disputed issues for a two-year period. Board 282's award permitted the carriers to eliminate up to 90 per cent of the firemen's jobs in freight and yard service. While the award was in effect (between early 1964 and early 1966), the carriers managed to eliminate about 18,000 firemen's jobs, far more than had been expected.[2]

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[2] A fuller history of the dispute summarized here can be found in this court's opinion in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 128 U.S.App.D.C. 59, 385 F.2d 581 (1967), *cert. denied*, 390 U.S. 923 (1968).

Such a large scale elimination of firemen made it clear that further sources of new engineers would have to be found for the future. In early 1965 the Firemen's union, operating from the premise that the craft's traditional role as supplier of engineers gave it a bargainable interest in future engineer training programs, proposed apprenticeship plans to the Louisville & Nashville and Southern Pacific Railroads under Section 6 of the Railway Labor Act.[3] In November 1965 the Firemen proposed similar plans under Section 6 to over a hundred other rail carriers.

Service of these notices provoked objection from the Engineers' union. The Engineers claimed to be the exclusive representative of any future apprentice engineers, and asserted exclusive bargaining jurisdiction over all programs for training engineers. They warned the carriers not to bargain with the Firemen over the proposed plan. When the carriers did not reply to the Firemen's Section 6 notice, the Firemen sought the mediatory services of the National Mediation Board under Section 5 of the Act,[4]

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[3] 45 U.S.C. § 156 (1964):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions * * *. * * *"

[4] 45 U.S.C. § 155 (1964):

"First. Disputes within jurisdiction of Mediation Board.

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

* * * * *

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and the Board docketed the request and scheduled mediation between the Firemen and the L & N and Southern Pacific companies.

In the meantime, the L & N negotiated an agreement with the Engineers for an apprenticeship program, the details of the program to be left to management discretion. The Engineers were recognized by the railroad as the bargaining representative for the new class of apprentices. Since the bringing of this suit in the District Court, the Great Northern Railway Company has entered into a similar agreement with the Engineers and very recently has set in motion its own apprentice program.

The Firemen objected to the L & N entering into an agreement with the Engineers before it bargained with the Firemen concerning their similar proposal. They brought suit in the Eastern District of Kentucky to enjoin the implementation of the Engineers—L & N agreement. The court dismissed the suit for want of jurisdiction. That judgment was affirmed by the Sixth Circuit on the ground that the case involved a jurisdictional dispute which, under applicable Supreme Court precedents, was for the National Mediation Board to decide (if indeed it could be decided in any official forum).[5]

The carriers,[6] arguing that they were caught in a dilemma by the competing claims of the rival unions,

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"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. * * *"

[5] *Brotherhood of Locomotive Firemen & Enginemen v. Louisville & Nashville R. Co.*, 6 Cir., 400 F.2d 572 (1968), *cert. denied*, ____ U.S. ____, 37 U.S. L. WEEK 3262 (January 20, 1969).

[6] The carriers in question were the L & N and the Southern Pacific, the first two carriers upon which the Firemen had served their § 6 notices. Both had refused to bargain with the Firemen over the notices.

sought the mediatory services of the National Mediation Board under Section 5

> "in order that they may be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers."

The Board declined the carriers' request for mediation, stating that "[t]he question as posed involved a question of representation. Such issues are resolved under Section 2, Ninth * * *." [7]

Section 2, Ninth, of the Railway Labor Act, the key statutory provision involved in this case, places upon the National Mediation Board the duty to investigate "any dispute * * * among a carrier's employees as to who are the representatives of such employees" and to certify to the parties and to the carrier the name of the true representative. The Supreme Court has held that, while the Board's decisions on the merits under this section are unreviewable by the courts,[8] its statutory duty to "investigate" the disputes in question can be judicially enforced.[9]

After the Board had rejected the carriers' request for mediation, the Engineers requested a Board decision under Section 2, Ninth. As the Engineers viewed the situation, a dispute existed between them and the Firemen over who represented the apprentice engineers employed by the L & N. And in the Engineers' view, this dispute fell within the purview of Section 2, Ninth.

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[7] The reason given by the Board for declining to offer mediatory services under § 5, First, appears to conflict with its later decision that no § 2, Ninth, representational dispute existed. The apparent conflict is discussed *infra*, Note 10.

[8] *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943).

[9] *Brotherhood of Railway & Steamship Clerks v. Ass'n for Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965).

The Board, however, found that no Section 2, Ninth, dispute actually existed, so that it lacked jurisdiction to certify a representative.[10] At this point, the Board's posture was as follows: (1) It had declined to advise the carriers which of the unions represented the apprentices under the guise of Section 5 mediation. (2) It had declined the Engineers' request to settle the same question under Section 2, Ninth. (3) It had granted the Firemen's request to mediate the dispute created by the carriers' refusal to bargain over the Firemen's proposed apprenticeship program, and had scheduled mediation between the Firemen and the carriers.

The Engineers, joined in part by the carriers, then brought the present suit. They sought to compel the Board to settle the jurisdictional dispute under Section 2, Ninth, to prevent the carriers and the Firemen from bargaining over the Firemen's apprenticeship proposal, and to enjoin the Firemen from striking to compel such bargaining. Pleadings and affidavits were received by the District Court, and on cross-motions for summary judgment the court found for the Engineers and granted the relief sought.[11]

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[10] This decision is in apparent conflict with the reason the Board gave for declining the carriers' request for § 5, First, mediation. However, the Board's earlier ruling stated that "[t]he question as posed" was representational. The carriers had indeed posed it as a representational dispute. Thus the Board was merely declining to give an advisory opinion under the guise of mediation on a question which it might later be called upon to determine authoritatively. It was *not* ruling that a § 2, Ninth, dispute was actually presented; it did not have sufficient facts before it to make such a determination.

[11] The Engineers sued the Firemen, the Board and the six carriers who are appellees here, asking that (1) the Firemen and the carriers be enjoined from bargaining over the § 6 notice and (2) the Board be ordered to decide the dispute. The carriers, essentially nominal defendants, answered and cross-claimed

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In our view, the District Court's orders rest upon two erroneous conclusions of law. It concluded first that:

> "* * * The apprentice notices served by the BLF&E [Firemen] upon the carrier defendants and many other carriers are valid and bargainable under the Railway Labor Act * * * only if the BLF&E is the duly designated and authorized representative on such carriers of apprentices training to be locomotive engineers * * *." [12]

And second that:

> "The dispute between the BLE [Engineers] and the BLF&E * * * is a dispute among employees as to who are the representatives of such employees, within the meaning and intendment of Section 2, subd. Ninth of the Railway Labor Act * * *. * * *" [13]

II.

The view that the Firemen can bargain about the content of an apprenticeship program only if they represent the apprentices is based on an overextension of *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). In *Virginian Railway* a dispute existed among the carrier's employees whether they were represented by a company union or by a union affiliated with the American Federation of Labor. The Mediation Board certified the A.F.L. union in a Section 2, Ninth, proceeding. The carrier continued to bargain with the company union. Upholding an injunction against this bargaining, the Supreme Court held:

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against the Firemen, asking that the § 6 notice be declared non-bargainable and that the Firemen be enjoined from striking to force such bargaining. The court's relief against the Board and the Firemen granted the prayers of both the Engineers and the carriers, so that they are appellees here.

[12] 284 F.Supp. at 351.

[13] *Ibid.*

> "* * * The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board * * * is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other * * *." [14]

The duty to treat with "the true representative" of employees and "with no other" must be read in the context of the facts in *Virginian Railway*. There the Mediation Board had already determined that one union was the representative of the only employees concerned. The company union properly represented nobody. Hence the carrier could not bargain with the company union without derogating from the representative status of the certified union.

Here the facts are very different. The Mediation Board has not certified which union is the true representative of "apprentice locomotive engineers." As we discuss more fully below, it was quite correct in refusing to make such a certification. Thus, in bargaining with the Firemen over the terms of the apprentice engineer program, the carriers would not have derogated from the Engineers' status as certified representative of locomotive engineers, unless in some way such bargaining violated the carriers' collective agreement with the Engineers. But if this latter were the case, the Engineers' proper remedy lay not in the courts or before the Mediation Board, but rather in a proceeding under Section 3 of the Act before the National Railroad Adjustment Board.[15] In short, no representative

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[14] 300 U.S. at 548.

[15] 45 U.S.C. § 153 (1964). Section 153, First (i), gives the National Railroad Adjustment Board jurisdiction to decide "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpreta-

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had been certified for "apprentice engineers." In such a situation, any union for whom future apprentices were "fairly claimable" as part of that union's craft or class could legitimately bargain with the carriers about the terms and conditions under which such future engineers would work.[16]

Consideration of the history of the relationship between the Firemen and the Engineers leads to the conclusion that the Firemen had a reasonable expectation that they might finally represent at least some future employees falling within the as yet largely empty category of "apprentice engineers."[17] Though logic may point toward the Engineers' union representing all apprentice engineers, history as well as logic plays a large part in labor relations in the railroad industry. Historically, the Firemen's union had represented all persons learning to be engineers, because persons learned to be engineers while working as firemen. Whether the change from pure-on-the-job training

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tion or application of agreements concerning rates of pay, rules, or working conditions" upon petition by either party. When such disputes involve a second union, the N.R.A.B. has the duty to consider the claims of the second union. *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966).

[16] *Cf. Meat and Highway Drivers, etc., Local 710 v. N.L.R.B.*, 118 U.S.App. D.C. 287, 335 F.2d 709 (1964).

The question of which proposals are bargainable is one which, under the Railway Labor Act, may be decided by the courts. By their very nature, such questions cannot be settled by collective bargaining, and the Act does not provide for their settlement by either the National Mediation Board or the National Railroad Adjustment Board.

[17] This is not to cast doubt on the Engineers' status as representatives of the apprentices actually employed by the L & N. The point is rather that, after the Firemen have had a chance to bargain over the nature of the apprenticeship program, some apprentices at some stage of the program might appropriately be represented by the Firemen.

to a more formalized apprenticeship program will completely eliminate the Firemen from a representative role thus is a question at least open to doubt.

The fact that it was reasonable for the Firemen to claim some role in representing apprentice engineers is concretely illustrated by the joint proposals of the Firemen and the Engineers made as recently as 1960. Those proposals, which the two unions agreed upon, contemplated a graduated program in which the employee would move through four stages: locomotive helper (trainee), locomotive helper, locomotive helper (apprentice engineer), and locomotive engineer. Elsewhere in the proposals, "helpers" were equated with firemen. Thus the scheme contemplated representation by the Firemen through three of the four stages.[18]

Further, and quite apart from any claim on the part of the Firemen to possible representation of future apprentices, the Firemen were the certified representatives of a group of employees with a strong economic interest in the nature of any apprentice engineer program. The existing firemen employees of the carriers had traditionally looked forward to eventual promotion to the engineer seniority list, and, by progress up that list, to status and pay as operating engineers. Yet the injection of a separate apprentice program for the training of engineers would clearly reduce the individual fireman's chances of reaching that goal.

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[18] The Presidential Commission which was constituted to attempt a settlement of the work rules dispute of the early 1960's took note of the need for new sources of engineers, and recommended that:

> "a joint committee should be established composed of representatives of the Carriers and *the Organizations representing engine service employees.* This Committee would consider the development of a training program which would adequately meet the long run need for future trained engineers." (Emphasis added.)

Under the agreement between the Engineers and the L & N, the nature of the apprenticeship program was left to management discretion. Management instituted a 90-day training program, at the end of which trainees would be qualified as engineers. The Firemen proposed a much longer training program extending over three years. Whatever the merits of the latter proposal, it can certainly be seen as economic protection for firemen not yet on the engineer seniority list. It would delay the infusion of new engineer recruits into those lists for three years, thus allowing present firemen a first crack at available engineer jobs.

Whether the Firemen's interest in the length and seniority provisions of any engineer apprenticeship program qualifies as a bargainable interest is governed by *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U.S. 330 (1960). In *Telegraphers* the carrier proposed to eliminate certain railroad stations, and the jobs that went with them, for reasons of efficiency. The union proposed a provision that no existing jobs be eliminated except by agreement between the carrier and the union. The carrier refused to bargain, taking the position that this work preservation proposal did not involve "conditions of employment," but rather invaded the exclusive prerogatives of management. The Supreme Court held that the proposal, which related to the "job security" of the union's members, was bargainable. It went on to state:

> "* * * [T]he trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees

themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large." [19]

Here, even assuming that the Firemen will never represent any of the apprentice engineers, present firemen have a "job security" interest in the length and size of the apprenticeship program. Their union has long bargained with the carriers over the process of turning firemen into engineers.[20] In the past they have even bargained to restrict carriers' practice of bringing in outside engineers to fill vacant jobs.[21] Thus their historical expectation of promotion to the job of engineer is a "term or condition" of their employment which their union may legitimately bargain to protect.

Therefore, we conclude that the Firemen's Section 6 notice concerning engineer apprenticeship programs,

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[19] 362 U.S. at 338.

[20] For example, the Firemen's collective agreement with the St. Louis Southwestern Railway Company contains the following provisions:

"62-1. Firemen shall rank on the firemen's roster from the date of their first service as firemen when called for such service except as provided in Article 62-11, and when qualified shall be promoted to positions as engineers in accordance with the following rules:

"62-2. Firemen shall be examined for promotion according to seniority on the firemen's roster, and those passing the required examination shall be given certificates of qualification, and when promoted, shall hold their same relative standing in the service to which assigned."

[21] While the railroads were under federal control during World War I, firemen complained that their promotional chances were being impaired by the carriers' practice of hiring outside engineers over the heads of their own firemen with many years' seniority. As a result, the industry adopted the "Chicago Joint Agreement," which regulated this practice. When the railroads returned to private control, the provisions of the Chicago Joint Agreement were retained through collective bargaining.

served on appellee carriers during 1965, was bargainable under the Railway Labor Act. The National Mediation Board's scheduling of mediation over the notice was proper under Section 5 of the Act. The District Court's order relieving the carriers of their duty to bargain over the notice must be set aside.

III.

The District Court also ordered the National Mediation Board to investigate the dispute and certify to the parties "whether apprentices being trained to become locomotive engineers come within the craft or class of locomotive engineers * * * or within the craft or class of locomotive firemen * * *, if either." [22] The court's order was based upon Section 2, Ninth, of the Railway Labor Act, which provides that the Board shall "investigate" and decide disputes "among a carrier's employees as to who are the representatives of such employees." The Board had denied the Engineers' request that it settle the dispute under Section 2, Ninth.

As the Supreme Court has noted, Section 2, Ninth, was designated to "resolve a wide range of jurisdictional disputes between unions or between groups of employees." [23] On the other hand, some inter-union disputes are "left to those voluntary processes whose use Congress ha[s] long encouraged to protect these arteries of interstate commerce from industrial strife." [24] And as this court has recognized, "the Board has no power under

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[22] 284 F.Supp. at 353.

[23] *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 336 (1943).

[24] *Id.* at 337.

Section 2, Ninth, to decide a jurisdictional dispute merely as such." [25]

The language of Section 2, Ninth, describes with some precision the nature of the "inter-union" or "jurisdictional" disputes which the section covers. The Board is to decide disputes "among a carrier's employees as to who are the representatives of such employees." The statute describes the manner in which the dispute is to be settled. The Board may use a secret ballot, or "utilize any other appropriate method" of determining the "choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." [26]

The regulations promulgated by the Board under Section 2, Ninth, conform to the natural reading of the statutory language. To invoke the Board's Section 2, Ninth, powers, a union challenging another union's right to represent a class or craft must present authorization cards showing that employees within the class or craft support the invoking union.[27] Further regulations set out the number of authorization cards which must be presented before the Board will hold an election.[28] Thus the regulations, like the statute, contemplate that when within an existing group of employees some wish to be represented by one union and some by another, the Board is to decide which union is "the true representative."

The situation presented to the Board in this case deviated widely from the sort of dispute contemplated by Section 2, Ninth. The Engineers applied to the Board for a Section 2, Ninth, decision as to who represented the ap-

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[25] *Brotherhood of Railroad Trainmen v. National Mediation Board*, 77 U.S. App.D.C. 259, 263, 135 F.2d 780, 784 (1943) (concurring opinion of Rutledge, J.).

[26] 45 U.S.C. § 152, Ninth.

[27] 29 C.F.R. § 1203.2 (1968).

[28] 29 C.F.R. § 1206.2 (1968).

prentice engineers recently hired by the L & N (the only carrier to have actually hired apprentices). It will be recalled that the L & N apprenticeship program was instituted pursuant to an agreement with the Engineers, which left the content of the program to management discretion. These apprentices were to be represented by the Engineers. The carriers thought so, the union thought so, and apparently the apprentices thought so. No authorization cards were brought to the Board showing a dispute *among* the apprentices over who represented them. Nor was this a mere technical failing; no one has claimed before the Board, before the District Court, or before us, that any such dispute could have been shown.

There was undoubtedly a dispute between the two unions which revolved generally around the apprenticeship program. For instance, the Firemen thought that the L & N should bargain over the Firemen's proposal; the Engineers and the L & N thought not. In that the unions represent their members, this was a dispute among employees of the carrier. The firemen employees thought they had a bargainable interest in the apprenticeship program; the engineer employees thought not. But no single employee was in dispute with another employee over who did or should represent a group to which they jointly belonged.

Thus the Board's decision that it did not have Section 2, Ninth, jurisdiction was firmly supported by the language of the statute and by the scheme erected to administer it. In addition, of course, the Board's construction of its own jurisdictional statute deserves substantial deference.[29] If more is needed, sound policies rooted in the Railway Labor Act supported the Board's decision.

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[29] *Udall v. Tallman*, 380 U.S. 1 (1965); *cf. S. E. C. v. National Securities, Inc.*, ____ U.S. ____, ____, 37 U. S. Lw Week 4101, 4105 (January 27, 1969).

When the Board makes a craft or class determination concerning a group of employees, it does so partly on the basis of the kind of work those employees are doing.[30] If their work looks more like the work traditionally done by firemen, that cuts in favor of certifying them as firemen; if it looks more like engineers' work, the Engineers' union is more likely to be certified as the representative.

Here, the Board could not yet know the nature of what work, if any, the apprentices would be doing. To that extent, it was disabled from making a proper Section 2, Ninth, class or craft determination. True, apprentices were employed on the L & N. But that program had been worked out solely between the carrier and the Engineers. The Firemen had not yet been able to bargain about the nature of the program. The Board could not fairly make its determination on the basis of a program respecting which only one of the two competing unions had had its say. To have done so would have in effect accepted a *fait accompli* achieved only because the carrier had improperly refused to bargain with the Firemen.

It may be that the Firemen have sufficient bargaining power to win some concessions from the carriers concerning apprentice training. Perhaps a longer apprenticeship program can be won, a less formal program involving more on-the-job training. Perhaps the suggestion in the Firemen's original proposal that the program be regarded as a training program for enginemen generally (that is, firemen and engineers) might be implemented in part or in whole.[31] Any of these changes might alter the Board's ulti-

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[30] See *Brotherhood of Railway & Steamship Clerks v. Ass'n for Benefit of Non-Contract Employees, supra* Note 9, 380 U.S. at 662-665.

[31] The Firemen's § 6 notice included a definition of "apprentice" as "a person who is engaged in learning the craft of

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mate Section 2, Ninth, determination as respects representation of apprentices. Finally, the unions might achieve some degree of harmony in tripartite bargaining and mediation with the railroads. And some joint-union apprenticeship plan, akin to that proposed in 1960, might obviate the need for any Section 2, Ninth, determination at all.

These policy considerations demonstrate why it would be premature for the Board to decide now who represents apprentice engineers. These policies, the literal language of the statute, and the Board's own reading of it, all lead toward the conclusion that the Board presently lacks jurisdiction under Section 2, Ninth, to determine the representative of apprentice locomotive engineers.

Accordingly, the District Court's injunction ordering the Board to decide the dispute must be vacated. The District Court orders enforcing its basic decree, from which the Firemen have sought interim relief, must be vacated along with the decree itself.

Reversed.

BURGER, *Circuit Judge*, with whom *Circuit Judge* TAMM joins, *concurring*: I concur in the result reached and add these comments to clarify the basis upon which I rely.

The arguments advanced by the Carriers and the Engineers are very persuasive as to what kind of statute the public interest called for, as the instant case and others abundantly illustrate. Unfortunately, however, an inadequate statutory scheme leaves the problems posed by this litigation "falling between two stools." The absence of

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Locomotive Enginemen." In fact there is no such recognized craft, as the District Court found, 284 F.Supp. at 346. The terms "engineman" or "engine service employee" refer to the joint class of firemen and engineers.

existing apprentices seems to preclude there being a "representational" dispute within the meaning of Section 2, Ninth. As for the two presently operating apprentice programs Section 2, Ninth, once again appears unavailing since there is no dispute among those apprentices as to who their representative is. Finally, since none of the parties claim that the instant dispute arises under their respective collective bargaining agreements, it appears that the National Railroad Adjustment Board does not have jurisdiction. Thus, despite a clearly expressed broad Congressional intent that "(a)ll disputes * * * be considered with all expedition," 45 U.S.C. § 152, Second, the shippers —and the public, which ultimately bears the burdens of all such conflicts—must continue to pay a heavy cost for the futile controversy which has engaged the courts and numerous litigants for so long.

Added to this, we cannot be unmindful that for over thirty years the Mediation Board has construed the statute as not vesting in it the powers which Appellees urge. The controversies which led to the creation of Board 282 and subsequent events might well cause some doubts in Congress as to the Board's construction of the statute, but this cannot encourage us, as admittedly is often done by judges, to read the statute—a euphemism for re-writing it—as we think Congress should have drafted it. That the course we are compelled to follow may well prolong this unhappy history of wasteful strife is a matter within the power and province of Congress.

The broad claims of the Firemen concerning the historical connection between their craft and the training of railroad engineers deserves some comment. The firemen were indeed the source of most of those who became railroad engineers, but they were the "pupils," not the teachers; the engineers trained and taught the firemen so that

they could qualify for engineer jobs when available. To what extent this gives the Firemen a "bargainable interest" in the apprenticeship training program of the Carriers is not clear, but we are not called upon now to define its scope.

Moreover, if anything is clear from the history which preceded Board 282 it is that due to gradual technological changes the traditional functions of the Firemen had become largely obsolete, but the carriers, shippers and the public were not relieved of the burden of unneeded employees. To remedy this problem Congress created Board 282; after lengthy hearings the Board permitted the carriers to extinguish up to ninety percent of the Firemen's jobs. Although the 282 Award has, by its terms, expired, this Court has recognized that its obvious legislative intent has not thereby lost its vitality.[1] The primary interest of the Firemen at this juncture is to ensure that their promotional rights are not impaired by having graduate apprentices supersede existing firemen in their quest to become engineers. History and logic, then, may well point toward confining the "bargainable interest" of the Firemen solely to the *effect* and not the internal structure of the apprentice programs; this is not to say that both of the contending Unions may not have some contribution to make within the framework of their experience.

Today's result places the carriers in the unhappy position of having to deal simultaneously with two rival unions whose bargaining demands will very likely conflict if a high order of union statesmanship is not forthcoming. Moreover, since both Unions have now been given the

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[1] See *Brotherhood of L.F.E. v. Bangor & Aroostook R.R. Co.*, No. 20,472 (D.C. Cir., decided February 28, 1969); *Brotherhood of Railroad Trainmen v. Akron & B.B.R.R. Co.*, 128 U.S. App. D.C. 59, 385 F.2d 581 (1967) *passim*, *cert. denied*, 390 U.S. 923 (1968).

right to serve Section 6 notices, the disappointed Union will have the right to strike once the statutory procedures are exhausted. The Carriers will be able neither to avoid nor to resolve a strike by agreeing with the striking union without the risk of violating its obligation not to depart unilaterally from its agreement with the other Union. Although I consider this to be a wholly unsatisfactory resolution I can find nothing in the statute which permits the Court to impose a different result.

JUDGMENT OF THE COURT OF APPEALS.

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration thereof, It is ordered and adjudged by this Court that the judgment of the District Court dated April 26, 1968, appealed from herein is hereby reversed, and the District Court is hereby directed to vacate the aforesaid judgment.

Per Curiam.

For the Court: NATHAN J. PAULSON,
Clerk.

Dated: March 14, 1969.

Opinion by Circuit Judge Wright.

Separate concurring opinion by Circuit Judge Burger, with whom Circuit Judge Tamm joins.

APPENDIX B.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT OF THE DISTRICT COURT.

[Filed April 26, 1968]

On the basis of the pleadings and affidavits on file, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Each of the defendants Louisville & Nashville Railroad Company, Southern Pacific Company, Great Northern Railway Company, Illinois Central Railroad Company, Atlantic Coast Line Railroad Company, and St. Louis Southwestern Railway Company is a "carrier" as defined in Section 1 First of the Railway Labor Act (45 U.S.C. § 151 First).

2. The plaintiff Brotherhood of Locomotive Engineers (hereinater called the "BLE"), and the defendant Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the "BLF&E") are unincorporated labor organizations which represent certain employees of the carrier defendants and of various other carriers for purposes of the Railway Labor Act (45 U.S.C. §§ 151 et seq.).

3. The defendant National Mediation Board (hereinafter called the "NMB") is an agency of the federal government which has certain duties, powers, and functions under the Railway Labor Act (45 U.S.C. § 154).

4. In the railroad industry, the representation of employees by labor organizations is and for many years has been on the basis of crafts or classes of employees.

5. There are and for many years have been two crafts or classes of engine service employees, that is, employees whose basic duties are confined to service in the cabs of locomotives: locomotive engineers and locomotive firemen.

6. The BLE is and for many years has been the duly designated and authorized representative of the craft or class of locomotive engineers on each of the carrier defendants and on most of the other railroads in the United States. On each carrier where that is true, it is undisputed that under the Railway Labor Act the BLE is the exclusive representative of all of the carrier's employees within the craft or class of locomotive engineers and is the only organization authorized to serve upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of proposals to change the rates of pay, rules, or working conditions applicable to the craft or class of locomotive engineers, to confer, negotiate, or bargain with the carrier about such proposals, and to enter into agreements with the carrier about the rates of pay, rules, and working conditions applicable to the craft or class of locomotive engineers.

7. The BLF&E is and for many years has been the duly designated and authorized representative of the craft or class of locomotive firemen on each of the carrier defendants and on most of the other railroads in the United States. On each carrier where that is true, it is undisputed that under the Railway Labor Act the BLF&E is the exclusive representative of all of the carrier's employees within the craft or class of locomotive firemen and is the only organization authorized to serve upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of proposals to change the rates of pay, rules, or working conditions applicable to the craft or class of locomotive firemen, to confer, negotiate, or bargain

with the carrier about such proposals, and to enter into agreements with the carrier about the rates of pay, rules, and working conditions applicable to the craft or class of locomotive firemen.

8. There is no existing separate craft or class of employees, for purposes of the Railway Labor Act, designated or known as "engine service employees" or "locomotive enginemen." The term "engine service employees" is commonly understood in the railroad industry to refer to both locomotive engineers and locomotive firemen.

9. Locomotive engineers generally are needed and used on all locomotives operated by a carrier. Prior to the effectuation of the Award by Arbitration Board No. 282, agreements between the carriers and the BLF&E generally required that a locomotive fireman be used on each locomotive operated by a carrier. That Award, which was issued on November 26, 1963, pursuant to Public Law 88-108 (77 Stat. 132), generally authorized the carriers to eliminate up to ninety percent of locomotive fireman positions on locomotives in freight and yard service.

10. For many years, the carriers' needs for additional locomotive engineers had been met primarily, although not exclusively, by the promotion of qualified locomotive firemen to the craft or class of locomotive engineers. When a locomotive engineer is no longer needed as such, because of fluctuations in the carrier's business or other reasons, he may be demoted, according to his seniority, to the craft or class of locomotive firemen. The collective bargaining agreements between each carrier and the BLE and the collective bargaining agreements between that carrier and the BLF&E contain substantially identical provisions concerning the promotion of qualified locomotive firemen to locomotive engineers and the demotion of unneeded locomo-

tive engineers to locomotive firemen. Those provisions were adopted by the Director General of Railroads in 1919, when the railroads were being operated by the Federal Government, and have been retained, with some modifications, ever since. They do not specify the training required before a locomotive fireman may be qualified for promotion to locomotive engineer or a locomotive engineer may be hired by a carrier.

11. A locomotive fireman who has been promoted to the craft or class of locomotive engineers thereafter is represented by the BLE (except on those few railroads on which the craft or class of locomotive engineers is represented by the BLF&E) for as long as he remains a member of that craft or class; he is no longer represented by the BLF&E; and the rates of pay, rules, and working conditions established by the carrier with the BLE, rather than the rates of pay, rules, and working conditions established by the carrier with the BLF&E, are applicable to such individual. When a locomotive engineer has been demoted to the craft or class of locomotive firemen, thereafter he is represented by the BLF&E (except on those few railroads on which locomotive firemen are represented by the BLE) for as long as he remains a member of that craft or class; he is no longer represented by the BLE; and the rates of pay, rules, and working conditions established by the carrier with the BLF&E, rather than the rates of pay, rules and working conditions established by the carrier with the BLE, are applicable to such individual.

12. Prior to the effectuation of the Award by Arbitration Board No. 282 (Finding of Fact 9, above), the needs of the carriers for additional locomotive engineers generally could be fully satisfied through the promotion of qualified locomotive firemen and the hiring of persons other-

wise qualified to become locomotive engineers. There was no necessity for a program to train apprentices to become locomotive engineers, and none of the carriers had such a program. As the number of locomotive firemen employed by the carriers, and thus the number of locomotive firemen qualified for promotion to locomotive engineers, has been reduced following effectuation of the Award by Arbitration Board No. 282, the defendant Louisville & Nashville Railroad Company has found it necessary to provide an additional source for obtaining locomotive engineers. Other carrier defendants and other railroads foresee a similar need within the near future.

13. In order to meet its needs for locomotive engineers, the defendant Louisville & Nashville Railroad Company determined it to be necessary, in April 1966, to establish a program for the training of apprentices to become locomotive engineers. On April 28, 1966, that carrier and the BLE entered into an agreement establishing the rate of pay applicable to such apprentices. While the Louisville & Nashville continues to promote qualified and available locomotive firemen to positions as locomotive engineers, part of its need for additional locomotive engineers is now being met by hiring apprentices who have successfully completed the apprentice training program and qualified to become locomotive engineers. The BLE has been recognized by the Louisville & Nashville as the designated and authorized bargaining representative of the apprentices, and the BLF&E has not applied to the NMB for an investigation to determine whether someone other than the BLE should be certified as the designated and authorized representative of such apprentices.

14. The defendant Great Northern Railway Company and the BLE entered into an agreement concerning the

future training of apprentices to become locomotive engineers on September 13, 1967. Apart from the Louisville & Nashville and the Great Northern, none of the carrier defendants has yet established a program for training apprentices to become locomotive engineers. In some instances, the establishment of such a program has been delayed by the dispute between the BLE and the BLF&E as to which organization is entitled to represent apprentices training to become locomotive engineers, but some of the carrier defendants and other railroads believe that the establishment of such an apprentice training program within the relatively near future will be essential in order to assure them of an adequate supply of qualified locomotive engineers.

15. On or about March 25, 1965, the BLF&E served upon the defendant Louisville & Nashville Railroad Company a notice, purportedly pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), which proposed the establishment of an apprentice training program. On or about April 28, 1965, the BLF&E served upon the defendant Southern Pacific Company a notice, purportedly pursuant to Section 6 of the Railway Labor Act, which proposed the establishment of an apprentice training program. On or about November 15, 1965, the BLF&E served upon each of the carrier defendants except the Louisville & Nashville Railroad Company and upon more than 100 other railroads throughout the United States a notice, purportedly pursuant to Section 6 of the Railway Labor Act; this notice consisted of three parts identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3"; the part designated as "Notice No. 3" proposed the establishment of an apprentice training program. "Notice No. 3" and the notices served upon the Louisville & Nashville

and the Southern Pacific, described above, are hereinafter called the "apprentice notices."

16. In its apprentice notices, the BLF&E proposed to require the carriers to establish a program for the training of apprentices who, upon successful completion of the program, would become qualified and receive seniority as locomotive engineers, and those notices otherwise relate to the training of apprentices to become locomotive engineers.

17. In correspondence with the carriers shortly after the BLF&E's apprentice notices had been served, the BLE claimed that those notices encroached upon its jurisdiction as the representative of the craft or class of locomotive engineers and that the carriers could not lawfully bargain or agree with the BLF&E upon the apprentice training program proposed in those notices. The BLE has since consistently maintained that position before the NMB and in this Court, as well as otherwise, and threatens to strike and engage in other self-help against any carrier that confers, negotiates, or otherwise agrees with the BLF&E upon the merits of its apprentice notices.

18. In correspondence with the carriers and the NMB and before this Court, the BLF&E has claimed and it now claims that its apprentice notices come within its jurisdiction as the representative of the craft or class of locomotive firemen and that the carrier defendants and the other carriers served with the said notices are required by the Railway Labor Act to confer, negotiate, and otherwise bargain with the BLF&E about the merits of the proposals made therein. There is substantial likelihood that the BLF&E, if not restrained by the court, will engage in strikes or other self-help against the carriers with respect to those proposals if the procedures of the Railway Labor

Act are exhausted without an agreement being reached between the said carriers and the BLF&E.

19. Since the BLF&E's apprentice notices were served on the carriers, there has existed, and there now exists, a dispute between the BLF&E and the BLE as to whether apprentices being trained to become locomotive engineers are a part of the craft or class of locomotive firemen.

20. A strike by either the BLE or the BLF&E against any of the carrier defendants would cause grave and irreparable injury to the carrier and would disrupt essential transportation services in interstate commerce.

21. The carrier defendants and the other carriers served with the BLF&E's apprentice notices have expressed their willingness to bargain with the duly designated and authorized representative of apprentices training to become locomotive engineers regarding any valid and bargainable proposal with respect to the rates of pay, rules, or working conditions applicable to such apprentices. The carriers have objected to the BLF&E's apprentice notices, however, on the ground that those notices are invalid and non-bargainable under the Railway Labor Act because they are not within the jurisdiction of the BLF&E as the representative of the craft or class of locomotive firemen. The carriers have contended that they are not required to bargain or agree with the BLF&E with respect to the BLF&E's apprentice notices unless and until it has been definitely determined that the BLE&E is the designated and authorized representative of apprentices training to become locomotive engineers. Consequently, the carriers have refused to bargain with the BLF&E upon the merits of the BLF&E's apprentice notices. At various times, the BLF&E has applied to the NMB for

its mediation services with respect to the apprentice notices served upon the carrier defendants and some of the other carriers, but no mediation upon the merits of the notices has occurred. The BLF&E has requested the NMB to terminate its services with respect to such notices, but the NMB has not done so.

22. On or about June 6, 1966, the representative of the carrier defendants and the other carriers that had been served with the BLF&E apprentice notices informed the NMB of the dispute between the BLF&E and the BLE arising out of the BLF&E's apprentice notices and requested mediatory services of the NMB in order that the carriers might "be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." On or about June 21, 1966, the NMB dismissed this application on the ground that the question as posed "involved a question of representation" and that "[s]uch issues are resolved under Section 2, Ninth, of the Railway Labor Act." On or about June 29, 1966, counsel for the carriers requested a hearing for the purpose of securing clarification of the grounds for dismissal. This request was denied by the NMB on June 22, 1966.

23. On or about June 25, 1966, the BLF&E filed a complaint against the defendant Louisville & Nashville Railroad Company in the United States District Court for the Western District of Kentucky (Civil Action No. 5402). In that complaint, the BLF&E sought to restrain the Louisville & Nashville from effectuating and implementing the agreement of April 28, 1966, between the Louisville & Nashville and the BLE (Finding of Fact 13, above). On or about July 5, 1966, the court dismissed that action after concluding that the "action involves a controversy between BLF&E and BLE * * * as to which of those organ-

izations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L & N and this Court has no jurisdiction to determine that controversy, the determination of which is exclusively within the jurisdiction of the National Mediation Board." An appeal by the BLF&E is now pending in the United States Court of Appeals for the Sixth Circuit (No. 17,588).

24. On or about June 30, 1966, and July 5, 1966, the BLE informed the NMB of the BLF&E's challenge to its right to represent apprentice locomotive engineers employed by the Louisville & Nashville and requested the NMB's services pursuant to Section 2 Ninth of the Railway Labor Act. On July 22, 1966, the NMB dismissed this application on the ground that its authority under Section 2 Ninth does not extend to a "jurisdictional dispute as such," and that "the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes."

25. On or about July 22, 1966, the NMB, acting upon the mediation cases involving the BLF&E's apprentice notices served upon the defendants Louisville & Nashville Railroad Company and Southern Pacific Company, notified the BLF&E and the carriers' representative that, because of the denial of the carriers' request for a hearing with respect to the dismissal of the carriers' application dated June 6, 1966 (Finding of Fact 22, above), the BLF&E and the carriers "should now enter into discussion concerning the Section 6 notices served by the BLF&E * * *." Accordingly, the NMB announced that

mediation conferences with respect to the apprentice notices served by the BLF&E upon those two carriers would be held on August 4, 1966.

26. On July 27, 1966, the BLE, stating its contention that the BLF&E's apprentice notice as served on the defendant Southern Pacific Company infringed on the BLE's right to represent apprentice locomotive engineers, applied for the NMB's services under Section 2 Ninth of the Railway Labor Act to determine which organization does represent apprentice locomotive engineers on the Southern Pacific for purposes of the Railway Labor Act, in order that the BLE might know whether that carrier could properly and legally bargain with the BLF&E concerning the apprentice notice. On July 28, 1966, the BLE requested the NMB to reconsider its dismissal of the BLE's Section 2 Ninth application with respect to the right to represent apprentice locomotive engineers on the Louisville & Nashville (Finding of Fact 24, above), and to advise the BLE as to the nature of the "[p]rocedures other than those outlined in Section 2 Ninth" which the NMB had stated, in dismissing that application, "are available" to settle the dispute between the BLE and the BLF&E (Finding of Fact 24, above). The NMB did not reply to either the July 27, 1966, request with respect to the situation on the Louisville & Nashville, except that the NMB notified the BLE, on or about August 1, 1966, that mediation conferences would be held as scheduled on August 4, 1966.

27. On August 4, 1966, representatives of the NMB met separately with representatives of the BLF&E and representatives of the carriers, but the merits of the BLF&E's apprentice notices were not discussed. No further mediation with respect to those notices has been scheduled.

CONCLUSIONS OF LAW.

1. This action arises under the Railway Labor Act, 45 U.S.S. §§ 151 et seq., and all parties are subject to that Act. The court has jurisdiction of the parties and the subject matter. 28 U.S.C. §§ 1331, 1337, 1361, 2201, 2202.

2. This action involves an actual case or controversy which is justiciable by this court. *Railway Clerks v. Employees Ass'n.*, 380 U.S. 650 (1965); *Brotherhood of R.R. Trainmen v. Akron & B.B. R.R.*, 55 CCH Lab. Cas. ¶ 11,912 (D.C. Cir., May 12, 1967), petitions for cert. pending; *Pan American World Airways, Inc. v. Int'l Bhd. of Teamsters,* ____ F. Supp. ____, 56 CCH Lab. Cas. ¶ 12,270, at 20,205 (S.D.N.Y. Nov. 9, 1967).

3. Under the Railway Labor Act, the duly designated and authorized representative of a craft or class of employees of a carrier is the exclusive representative of that craft or class for purposes of bargaining or agreeing with the carrier about the rates of pay, rules, and working conditions applicable to that craft or class. Only the duly designated and authorized representative of a craft or class of employees of a carrier may serve the carrier with a notice, pursuant to Section 6 of the Act, of proposed changes in agreements affecting rates of pay, rules, or working conditions applicable to such craft or class of employees. If an organization serves a carrier with a Section 6 notice concerning the rates of pay, rules, or working conditions of employees who are not within the craft or class represented by the organization, that notice is invalid, and the carrier is not required to confer, participate in mediation, or otherwise bargain with the organization concerning that notice or the proposals made therein. The apprentice notices served by the BLF&E upon the carrier defendants and many other carriers are valid and

bargainable under the Railway Labor Act, therefore, only if the BLF&E is the duly designated and authorized representative on such carriers of apprentices training to become locomotive engineers. 45 U.S.C. §§ 152 Second through Tenth, 156; *Virginian Ry. v. Federation*, 300 U.S. 515, 548-549 (1937); *Southern Pacific Co. v. Switchmen's Union*, 356 F.2d 332 (9th Cir. 1965); *Order of Railway Cond. & Brake. v. Switchmen's Union*, 269 F.2d 726 (5th Cir. 1959).

4. There is a *bona fide* dispute between the BLE and the BLF&E as to whether apprentices training to become locomotive engineers are within the jurisdiction of the BLF&E as the designated and authorized representative of the craft or class of locomotive firemen on the defendant carriers and many other carriers or within the jurisdiction of the BLE as the designated and authorized representative of the craft or class of locomotive engineers on such carriers. The carriers are not required under the Railway Labor Act to confer, participate in mediation, or otherwise bargain with the BLF&E over its apprentice notices unless and until it has been determined, in the manner provided by the Railway Labor Act, that the BLF&E is the duly designated and authorized representative on such carriers of apprentices training to become locomotive engineers. Until such time as it has been so determined and the procedures of the Railway Labor Act otherwise have been exhausted with respect to such notices, the BLF&E may not strike or otherwise engage in self-help against the carriers with respect to such notices or the proposals made therein. 45 U.S.C. §§ 155-160; *Southern Pacific Co. v. Switchmen's Union*, 356 F.2d 332 (9th Cir. 1965); *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 255 (2d Cir. 1963); *Flight Engineers' Inter. Ass'n. v. Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir.

1963); *Pan American World Airways v. Int'l Bhd. of Teamsters*, ____ F. Supp. ____. 56 CCH Lab. Cas. ¶ 12,270 at 20,206 (S.D.N.Y. Nov. 9, 1967); see *NLRB v. Downtown Bakery Corp.*, 330 F.2d 921, 928 (6th Cir. 1965); *Garment Workers v. NLRB*, 280 F.2d 616, 621-622 (D.C. Cir. 1960), *aff'd* 366 U.S. 731 (1961); *NLRB v. Hannaford Bros. Co.*, 261 F.2d 638, 640 (1st Cir. 1958).

5. The dispute between the BLE and the BLF&E referred to in paragraph 4 above is a dispute among employees as to who are the representatives of such employees, within the meaning and intendment of Section 2 Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth). *General Committee v. M.-K.-T. R. Co.*, 320 U.S. 323, 336 (1943); *Switchmen's Union v. NMB*, 320 U.S. 297, 302 (1943); *Howard v. St. Louis S.F. Ry.*, 361 F.2d 905, 909 (8th Cir. 1966); *Southern Pacific Co. v. Switchmen's Union*, 356 F.2d 332, 335 (9th Cir. 1965); *Brotherhood of Loc. F. & E. v. Louisville & N. R.R.*, Civil Action No. 5402 (W. D. Ky. 1966), *appeal pending* (6th Cir.); "Railway Labor Act Amendments," *Hearings before House Comm. on Interstate and Foreign Commerce on H.R. 7650*, 73rd Cong., 2d Sess., pp. 45, 57 (1934).

6. The applications by the BLE under Section 2 Ninth of the Railway Labor Act with respect to the representation of apprentices being trained to become locomotive engineers on the Louisville & Nashville Railroad Company and the Southern Pacific Company, respectively, were valid and sufficient invocations of the jurisdiction of the NMB under Section 2 Ninth of the Act. Upon receipt of those applications, it was the duty of the NMB to investigate the dispute between the BLE and the BLF&E and to certify to the parties whether such apprentices come within the craft or class of locomotive engineers represented by the BLE or within the craft or class of

locomotive firemen represented by the BLF&E, if either. *Railway Clerks v. Employees' Ass'n.*, 380 U.S. 650 (1965) and the authorities cited in paragraph 5 above.

7. The jurisdiction of the NMB under Section 2 Ninth of the Railway Labor Act to determine the dispute between the BLE and the BLF&E referred to in paragraph 4 above is exclusive, and this Court does not have jurisdiction to determine that dispute. *Railway Clerks v. Employees Ass'n.*, 380 U.S. 650, 658-661 (1965); *Switchmen's Union v. NMB*, 320 U.S. 297 (1943); *General Committee v. M.-K.-T. R. Co.*, 320 U.S. 323, 336 (1943); *General Committee v. Southern Pacific Co.*, 320 U.S. 338 (1943).

8. In dismissing or failing to act upon the applications of the BLE under Section 2 Ninth of the Railway Labor Act on the ground that the applications were beyond the jurisdiction of the NMB under Section 2 Ninth, the NMB failed to perform its mandatory duty under that Section. This court has authority to declare the statutory duty of the NMB in this action and to compel the NMB to perform its duty under Section 2 Ninth of the Act with respect to the BLE's applications. *Railway Clerks v. Employees Ass'n.*, 380 U.S. 650, 661 (1965); *Air Line Dispatchers Ass'n. v. NMB*, 189 F.2d 685 (D.C. Cir. 1951).

9. There is no genuine issue as to any material fact, and the BLE and carrier defendants are entitled to judgment as a matter of law, as hereinbefore set forth. Fed. R. Civ. P. 56.

10. The motion of the BLF&E for summary judgment should be denied, and the motions of the BLE and the carrier defendants for summary judgment should be granted as provided in the judgment being entered herewith.

/s/ JOHN J. SIRICA
United States District Judge

April 26, 1968

JUDGMENT OF THE DISTRICT COURT.

[Filed April 26, 1968]

Motions for summary judgment and affidavits having been filed by each of the parties except the defendant National Mediation Board, memoranda having been filed by all the parties, counsel for all the parties having been heard, the Court having determined that the motion for summary judgment filed by the defendant Brotherhood of Locomotive Firemen and Enginemen should be denied and that the motions for summary judgment filed by the plaintiff and by the carrier defendants should be granted, the Court having made its findings of fact and conclusions of law which are being filed herewith, and due deliberation having been had, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the defendant National Mediation Board has the power and duty, which it is hereby directed to exercise under Section 2 Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth), to investigate the dispute between the plaintiff and the defendant Brotherhood of Locomotive Firemen and Enginemen, pursuant to the applications heretofore filed by plaintiff with the National Mediation Board, and to certify to the parties whether apprentices being trained to become locomotive engineers come within the craft or class of locomotive engineers represented by the BLE or within the craft or class of locomotive firemen represented by the BLF&E, if either.

2. That the defendants Louisville & Nashville Railroad Company, Southern Pacific Company, Great Northern Railway Company, Illinois Central Railroad Company, Atlantic Coast Line Railroad Company, and St. Louis Southwestern Railway Company, respectively, are not required to confer, participate in mediation, or otherwise

bargain with respect to the apprentice notices served upon them by the Brotherhood of Locomotive Firemen and Enginemen unless and until the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to become locomotive engineers on such carrier defendant.

3. That the Brotherhood of Locomotive Firemen and Enginemen, each of its lodges, divisions, locals, officers, agents, and employees, and all persons acting in concert with them, are hereby enjoined from authorizing, calling, encouraging, permitting, or engaging in any strikes and from picketing the premises of any of the carrier defendants referred to in paragraph 2 above for the purposes of requiring any of the said carrier defendants to bargain or agree with the Brotherhood of Locomotive Firemen and Enginemen concerning the proposals made in its apprentice notices unless and until: (1) the National Mediation Board determines, pursuant to an investigation under Section 2 Ninth of the Railway Labor Act, that the Brotherhood of Locomotive Firemen and Enginemen is the duly designated and authorized representative of apprentices training to become locomotive engineers on such carrier defendant, and (2) the Brotherhood of Locomotive Firemen and Enginemen otherwise exhausts the procedures of the Railway Labor Act with respect to its apprentice notices.

4. Plaintiff and the carrier defendants shall recover from the defendant Brotherhood of Locomotive Firemen and Enginemen their taxable costs.

/s/ JOHN J. SIRICA
United States District Judge

April 26, 1968

APPENDIX C.

STATUTES INVOLVED.

Railway Labor Act, Title 45 U. S. C.

§ 151 a.

General Purposes. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employes or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. General Duties.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives

of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and

utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

§ 155.

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this Section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this

Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

§ 156.

Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipts of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.